IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.1069 OF 2005

M/s. Prabhu Hira Ice
& Cold Storage Ltd
& Ors. ...Applicant.

V/s

Nikunj Exim Enterprises
Pvt. Ltd. & Anr. ...Respondents.

Mr. A.M. Saraogi for the applicant.

Mr. V.S. Shitole, APP for the State.
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CORAM: V.M.KANADE,J.
DATE: 17th March, 2005

P.C.:

1. Heard the learned Counsel for the applicants.

2. It is submitted by the learned Counsel appearing on behalf of the applicants that two notices were issued by Respondent No.1 - Complainant after the cheques were dishonoured; one dated 11/1/2003 and the second notice was issued on 23/1/2003 calling upon the accused applicants herein to pay the amount of Rs 8 lakhs within a period of 15 days. It is submitted by the learned Counsel for the applicants that there is an averment in para 6 of the complaint that after the first notice was sent, it came back with remark "not claimed" and undelivered packets were received by the complainant. Thereafter, second notice dated

23/1/2003 was issued. It is submitted that the legal consequence of the notice not being claimed would be that the notice was served on the accused and, therefore, period of limitation of 15 days would start from the issuance of the first notice. It is further submitted that, similarly, the complaint was lodged on 24/2/2003. Since the period of limitation would start from 11/1/2003, there was delay in filing the complaint. It is, therefore, submitted that the complaint was not maintainable.

3. I am unable to accept the said submissions made by the learned Counsel appear for the applicants. The complainant in its complaint has stated that as per the orders and instructions placed by the accused from time to time the complainant had supplied and dispatched the security equipments to the accused No.1 under Delivery Challan No. HO/2323 dated 28/11/2002 and has raised Invoice No. HO/2323 dated 28/11/2002 for an amount of Rs 11,28,211/-. It is further stated that the accused had accepted the equipments without raising any complaint regarding price or quality or quantity of the goods supplied. The complainant has also annexed Delivery Challan dated 28/11/2002 and Invoice dated 28/11/2002.

4. It is further stated in the complaint that towards the discharge of their liability the accused had issued four cheques of Rs 2 lakhs aggregating to the sum of Rs 8 lakhs in favour of the complainant along with the covering letter dated 28/11/2002. All the cheques were dated 14/12/2002 and were drawn on Union Bank of India, Overseas Branch, Mumbai 400 004. These cheques were deposited on 2/1/2003 and the Bank informed the complainant by sending Memo dated 4/1/2003 that the cheques had been dishonoured on account insufficient funds. Thereafter, a demand notice dated 11/1/2003 was sent to the accused by Registered A.D. Post and also by UPC. The first notice returned with the remark "not claimed". Thereafter, the second notice was sent on 23/1/2003. It is stated in the complaint that when the second notice was sent on 23/1/2003, the acknowledgement of the Under Certificate of Posting notice had not returned back and, therefore, it was presumed that the first notice had not been duly received by the accused and, under these circumstances, the second notice was issued. The complaint was, thereafter, filed because even after expiry of 15 days from the second notice dated 23/1/2003, the accused failed and neglected to pay the amount. It is specifically averred in the complaint that the accused Nos. 2 and 3 are looking

after the business of accused No.1 and they are in charge of the day-to-day affairs of accused No.1 and they are liable to be prosecuted under section 141 of the Negotiable Instruments Act.

5. From the perusal of the complaint, it can be seen that all the ingredients which are required to be satisfied under section 138 read with section 141 are prima facie seen to have been made out from the averments which are made in the complaint. The submission of the learned Counsel for the applicants that there is delay in filing the complaint cannot be accepted. There is sufficient explanation given in para 6 of the complaint that because the acknowledgement under UPC had not returned, the second notice was issued on 23/1/2003. Therefore, the period of 15 days would have to be calculated from the second notice which was issued on 23/1/2003. The question whether the complaint was filed within limitation or not is a mixed question of fact and law and, therefore, it cannot be decided at this stage. This question can be decided by the trial court only after the evidence is led by both the parties. All questions raised in this Petition are, therefore, kept open.

6. Application of the applicants is, therefore, rejected. Hearing of the case is expedited. Trial Court to decide the case within three months.

7. At this stage, request is made for staying the order passed by this Court. Request is declined.

V.M. KANADE, J.